

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2521

PETITION OF AMIR H. GANDJBAKHCHHE AND MAHTAB HEKMAT

OPINION OF THE BOARD

(Public Hearing Date: October 30, 2002)

(Effective Date of Opinion: February 6, 2003)

Case No. S-2521 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment.

On October 30, 2002, the Board of Appeals held a hearing on the application, pursuant to Section 59-A-4.11 of the Zoning Ordinance. Amir H. Gandjbakhche testified in support of the application. Stephen M. Morris, Housing Code Inspector, Department of Housing and Community Affairs, testified about his inspection of the accessory apartment. Bill Wydro, a neighbor, testified and expressed concerns about possible future implications of granting the special exception.

Decision of the Board: Special Exception Granted, subject
to conditions enumerated below.

EVIDENCE PRESENTED

1. Amir Gandjbakhche and Mahtab Hekmat seek permission to operate an accessory apartment. The subject property is Lot 12, Block 3, Regency Estates Subdivision, located at 11814 Charen Lane, Potomac, Maryland, in the R-90 Zone.
2. The general neighborhood is bordered to the north by Postoak Road, to the east by Seven Locks Road, to the south by Gainsborough Road and to the west by a Potomac Electric Power Company right of way. [Exhibit No. 8].

3. The house was built in 1962. Mr. Gandjbakhche and Ms. Hekmat purchased the house in September, 2000 and have lived there since May, 2001. [Exhibit No. 3].

4. The accessory apartment is consists of a portion of the basement of the house. [Exhibit Nos. 3]. A sketch of the apartment layout is in the record as Exhibit No. 13.

5. The lot comprises 15,200 square feet. [Exhibit No. 3].

7. The apartment has a separate entrance at the rear of the house, and no exterior modifications are proposed in connection with the apartment [Exhibit Nos. 3, 6 and 7].

8. There are at least five off-street parking spaces available, four in the driveway and two in the garage. [Exhibit Nos. 3, 11].

9. Maryland National Capital Park and Planning Commission (MNCPPC) staff recommended denial of the application, based on a lack of information as to compliance of the application with Section 59-G-2.00(a)(9), and stated:

If at the public hearing before the Board of Appeals, a) the applicant can substantiate to the Board of Appeal's satisfaction the gross floor area of the accessory apartment (by, e.g., provision of data described in the staff report); b) the Board finds that the accessory apartment does not exceed the maximum allowable floor area of 1200 square feet, and c) the Board concurs with all other findings as detailed in this staff report, then staff recommends that the Board approve the use with ...conditions. [Exhibit No. 11].

The staff report also notes that the Potomac Subregion Master Plan (March 2002) is silent about accessory apartment uses, but supports the R-90 zone which allows accessory apartments by special exception.

10. Mr. Gandjbakhche testified that there has been a renovation to the house, but that it affected only the first and second floors, not the basement. He presented a revised Site Plan which was entered into the record as Exhibit No. 14, and a floor plan for the apartment, drawn to scale. [Exhibit No. 13].

11. Stephen M. Morris testified about his inspection of the subject property. A report of the inspection is in the record as Exhibit No. 10. The report states that the apartment meets housing code standards. Mr. Morris testified that he measured the accessory apartment after the renovation took place, and that the square footage of the accessory apartment does not exceed 1200 square feet.

He also testified that the habitable space of the accessory apartment is 322 square feet, which is suitable for no more than two occupants.

12. Mr. Morris testified that there is a special exception for an accessory apartment [Case No. S-1111] at 8000 Postoak Road. MNCPPC staff notes a special exception for a Home Occupation for home tutoring at 11700 Charen Lane. [Exhibit No. 11].

13. Bill Wydro lives at 11822 Charen Road. He expressed concern that granting the accessory apartment could set a precedent which would allow a proliferation of such uses.

FINDINGS OF THE BOARD

STANDARD FOR EVALUATION

Section 59-G-1.2.1 sets forth the standard that the Board must use to evaluate a special exception. That standard requires that a special exception be evaluated based on its inherent and non-inherent adverse effects at the particular location proposed, irrespective of adverse effect if elsewhere established in the zone [Zoning Text Amendment 99004, Opinion, p. 4].

Section 59-G-1.2.1. Standard for evaluation:

A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of the adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

The Board interprets this section to require the following analysis. The Board must:

(1) Make a determination as to the general neighborhood affected by the proposed use.

(2) Establish those generic physical and operational characteristics associated with a given use, in this case an accessory apartment, to create an evaluation standard. The evaluation standard does not include the actual physical size and scale of operations of the use proposed.

(3) Determine separately the physical and operational characteristics of the use proposed, in this case an existing accessory apartment.

(4) Compare the generic characteristics of the evaluation standard with the particular characteristics of the use proposed. Inherent adverse effects are those characteristics of the use proposed consistent with the generic characteristics of the evaluation standard. Non-inherent adverse effects are those characteristics found in the proposed use but not in the evaluation standard.

Applying the above analysis to this case, the Board finds as follows:

(1) *The General Neighborhood*

The Board finds that the general neighborhood for the proposed use is as described in Evidence Presented, paragraph 2.

(2) *Evaluation Standard - Physical and Operational Characteristics*

The Board recognizes that MNCPPC technical staff has, in previous cases, offered seven criteria to establish the physical and operational characteristics of a use. These are size, scale, scope, lighting, noise, traffic, and environment. The Board finds that the typical characteristics of an accessory apartment include a separate entrance for the apartment, possibly in combination with a walkway and some lighting to access the entrance. Some additional activity, including traffic and parking, associated with the residents of the apartment is also typical. The number of occupants allowed by the Housing Code is based upon the square footage of the dwelling unit.

(3) *Proposed Use -Physical and Operational Characteristics*

The habitable space in the proposed accessory apartment measures 322 square feet. It has a separate entrance at the rear of the house. Five off-street parking spaces are available.

(4) *Comparison of Characteristics*

(a) *Inherent Adverse Effects*

After considering the generic characteristics of accessory apartments and comparing them with the physical and operational characteristics of the proposed

use, the Board finds that all of the characteristics of the proposed use will be inherent ones.

(b) Non-Inherent Adverse Effects

The Board finds that there will be no non-inherent adverse effects of the requested accessory apartment.

59-G-1.21. General Conditions.

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone.

Section 59-C-1.31 of the Zoning Ordinance permits accessory apartments in the R-90 Zone by special exception.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

As detailed below, the use so complies.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

The Potomac Subregion Master Plan does not specifically mention accessory apartments, but supports the R-90 Zone, which allows them by special exception. The Board finds therefore, that the use is consistent with the Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

The accessory apartment has a separate entrance at the back of the house, maintaining the single family appearance of the neighborhood. Five off-street parking spaces are available and the apartment is suitable for no more than two occupants, minimizing the amount of activity or traffic it will bring.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Given its small size and ample parking, the Board finds that the accessory apartment as proposed will have relatively little impact on surrounding properties.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the accessory apartment will cause none of these adverse effects.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendation of a master or sector plan do not alter the nature of an area.*

The Board notes that there are two other approved special exceptions in the general neighborhood, one at the corner of Postoak Road and Seven Locks Road, and one at the corner of Seven Lock Road and Gainsborough Road. The Board finds that approval of this relatively low impact accessory apartment will not increase traffic or activity in the neighborhood to such a degree that the predominantly residential character of the neighborhood will be changed.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The proposed accessory apartment will have none of these adverse effects.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer public roads, storm drainage and other public facilities.*
 - (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

The adequacy of public facilities for the subject property was determined at the time of subdivision review. The accessory apartment, located in the existing house, will be served by adequate public facilities.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The proposed accessory apartment will have no detrimental effect on the safety of vehicular or pedestrian traffic.

- (b) *Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other authorization or approval required by law, nor does the Board's finding of facts regarding public facilities bind any other governmental agency or department responsible for making a determination relevant to the authorization, approval or licensing of the project.*
- (c) *The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.*

59-G-2.00 Specific Conditions: Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

(1) *Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Only one accessory apartment is proposed.

(2) *The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) *The lot is 2 acres or more in size; and*
- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

The accessory apartment will be located in the basement of the existing house and therefore shares a party wall in common with the house.

(3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

No addition or extension to the dwelling is proposed to accommodate the apartment.

(4) *The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

The house, constructed in 1962, is 40 years old.

(5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

None of the cited conditions exists on the subject property.

(6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

The apartment has a separate entrance at the rear of the house.

(7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

No external modifications are proposed in connection with the apartment.

(8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

The accessory apartment has the same address as the main dwelling.

(9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

The accessory apartment, consisting of a portion of the basement, is subordinate to the square footage of the main dwelling, and does not exceed the maximum allowable square footage of 1200 square feet.

(b) Ownership requirements:

(1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

The owners will occupy the main part of the house.

(2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

The Applicants purchased the property on September 18, 2000, more than one year before the effective date of the special exception.

(3) *Under no circumstances is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

The owners will only receive compensation for one dwelling unit.

(4) *For purposes of this section, "owner" means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.*

The Applicants for the special exception are the owners of the subject property.

(5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Not applicable.

(c) Land use requirements:

(1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

The lot size for the subject property is 15,200 square feet, more than the minimum lot size for the R-90 Zone. The property complies with all other applicable development standards.

(2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).*

The Board notes that there are two other approved special exceptions in the general neighborhood, one at the corner of Postoak Road and Seven Locks Road, and one at the corner of Seven Lock Road and Gainsborough Road. The Board finds that approval of this relatively low impact accessory apartment will not increase traffic or activity in the neighborhood to such a degree that the predominantly residential character of the neighborhood will be changed.

(3) *Adequate parking shall be provided. There must be a minimum 2 off-street parking spaces, unless the Board makes either of the following findings:*

(i) *More spaces are required to supplement on-street parking;*
or

(ii) *Adequate on-street parking permits fewer off-street spaces. Off-street parking spaces may be in a driveway but otherwise shall not be located in the yard between the front of the house and the street right-of-way line.*

At least five off-street parking spaces are available.

(d) Data to accompany application. *The Board may waive for good cause shown any of the data to accompany an application for special exception upon written request of the applicant. The Board may accept plans or drawings prepared by the applicant so long as they are substantially to scale and provide information the Board determines is adequate.*

No waivers were requested.

(e) *Any accessory apartment approved by the Board between December 2, 1983, and October 30, 1989, in accordance with the standards in effect during that period, is not a nonconforming use. It may be continued as long as it complies with the conditions imposed by the Board and all provisions of Division 59-G-1.*

Not applicable.

(f) Notice by sign required for continuation of use by new property owner. *Should the application by a new property owner to continue an existing accessory apartment special exception be treated as a minor modification, a sign giving notice of the application must be erected and maintained as required by Sec. 59-G-1.3(c).*

The applicants shall so note.

Therefore, based upon the foregoing, the Board **grants** the special exception, to the Applicants only, subject to the following conditions:

1. Petitioners shall be bound by their testimony and exhibits of record to the extent that such evidence and representations are identified in the Board's opinion granting the special exception.

2. Prior to issuance of the rental facility license for the accessory apartment by the Licensing and Registration Unit of the Division of Consumer Affairs, Department of Housing and Community Affairs, the applicants must create a walkway (paved or stepping stones) leading from the driveway around the side of the house to the (rear) entrance of the accessory apartment.

On a motion by Allison Ishihara Fultz, seconded by Louise L. Mayer, with Angelo M. Caputo and Donna L. Barron, Vice Chairman in agreement, and Donald H. Spence, Jr., Chairman, necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Appeals

Donna L. Barron
Vice Chairman, Montgomery County Board of

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 6th day of February, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.